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Supreme Court, U.S.
FILED

No. 94-29 JUN 13 1994

OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1994

ROBERT LEE DAVIS,

Petitioner,

v.

STATE OF NORTH CAROLINA,

Respondent.

**PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA**

PETITION FOR WRIT OF CERTIORARI

ROBERT L. DAVIS
40 Kensington Street
Post Office Box 768
Lumberton, North Carolina 28359
(910) 738-6892
Petitioner Pro Se

June 30, 1994

48 pp

## QUESTIONS PRESENTED

1. Whether the Supreme Court of North Carolina erred in holding that there were no Constitutional issues involved in Appellant's Petition for Discretionary Review?

2. Whether the Supreme Court of North Carolina erred in allowing the denial of due process of Law when Appellant was more harshly sentenced following retrial from the same offense from which he appealed for a trial de novo?

## LIST OF PARTIES

Robert L. Davis, Appellant below and Petitioner, herein.

The State of North Carolina, Appellee below and Respondent herein.

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No.

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STATE OF NORTH CAROLINA,

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PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF NORTH CAROLINA

PETITION FOR WRIT OF CERTIORARI

Petitioner, Robert Lee Davis, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of North Carolina, entered in the above-entitled proceeding on April 7, 1994.

## OPINION BELOW

The judgment of the District Court (App.A); however no written opinion was written.

The judgment of the Superior Court (App.B); however no written opinion was written.

The opinion of the North Carolina Court of Appeals (App.C)

The opinion of the Supreme Court of North Carolina (App.D)

## JURISDICTION

The Supreme Court of North Carolina issued an opinion affirming on April 7, 1994, denying petition for discretionary review, subsequently affirming Petitioner's conviction on April 15, 1993. Therefore, the petition for writ of certiorari is timely filed on or before July 5, 1994.

Petitioner was convicted in the Superior Court, Lumberton Robeson County, North Carolina for indecent exposure. North Carolina General Statute 14-190.9. The jurisdiction of this Court to review the judgment of the Supreme Court of North Carolina is invoked under 28 U.S.C. § 1257 and SUP.CT.R 13.1.

## STATUTES INVOLVED

North Carolina General Statute § 14-190.9 provides as follows:

The pertinent provisions of an individual exposing his private parts to person(s) of the opposite sex and the punishment regulations shall be guilty of a misdemeanor punishable by a fine not to exceed five hundred dollars ($500.00), imprisonment for not more than six months (6) or both.

North Carolina General Statute § 15A-401:

This statute entitled, "when officers may arrest without warrant" in part provides:

"A peace officer may without warrant arrest a person:

(1) When the person to be arrested in the presence of the officers, or when the officers has a reasonable

ground to believe that the person to be arrested has committed a felony or misdemeanor in his presence."

North Carolina General Statute § 15A-1335:

This statute entitled, "Resentencing after Appellate review" which provides as follows:

"When a conviction or sentence imposed in a Superior Court has been set aside on a direct review or collateral attack, the Court may not impose a new sentence for the same offense, or for a different offense based on the same conduct, which is more severe than the prior sentence..."

The Due Process and Equal Protection Clause ad Amend. XIV § 1, of the Constitution of the United States provides that, "No State shall ... deprive any person of life, liberty, or property, without due process of law; nor deny to

any person ... equal protection of the laws."

## STATEMENT OF THE CASE

In Cause No. 92 CRS 5565, Appellant was charged with indecent exposure pursuant to North Carolina General Statute § 14-190.9.

Appellant pleaded not guilty and a jury trial was conducted. Appellant was first tried in the District Court of Robeson County, found guilty. Appellant was given a six months suspended sentence, one year supervised probation and a fine of $55.00. Appellant appealed this conviction de novo.

Appellant was found guilty by the jury. (R. Vol.II). Appellant was sentenced to six months suspended sentence, two years supervised probation and special probation which included 20

weekends of active service in the Robeson County Jail.

At trial, the state presented a 16 year old girl to verbally state the charges against Appellant and there was no documented charges served upon Appellant. The state's witness, 16 year old Jamie Floyd, testified that Appellant exposed his penis in her presence while she was sitting in her parent's car in a public parking lot about 6:05 p.m. The state's witness further stated that the exposing of Appellant's penis lasted less than one minute. (R. Vol I).

The state brought forth two Lumberton City Police Officers: Mark Bradley and Don Ward who testified that Appellant confessed in a taped interview at the police station and the two officers testified that Appellant wrote a confession. The officers did not bring a

tape containing a confession and the officers did not present a statement of confession signed by Appellant. However, the said officers presented a written paragraph unsigned which did not contain Appellant's signature, nor was there a police officer's name associated with the said written paragraph. Moreover, there was no date listed to determine the writing thereof. The Appellant objected to the introduction of the written paragraph giving reason that Appellant never had any knowledge of a written paragraph as being introduced by the state as evidence against Appellant. The state never presented any opposing view concerning Appellant's lack of knowledge to the written paragraph.

At trial, Appellant presented his wife, Betty Davis, as evidence that Appellant was home by about 5:20 p.m. from

work on March 19,1992, the night of the alleged crime and the night of the arrest. Appellant's wife further testified that Appellant did not leave home until going with the officers on the night in question about 9:00 p.m.

Appellant requested Russell G. Walker, presiding Judge, for an attorney in that Appellant had communicated with an attorney whose practice is based in Durham, North Carolina. Appellant communicated with Attorney Micky Michax about July 12, 1993, and again about July 25, 1993. The judge denied Appellant counsel.

Appellant received notice of his date of Trial on April 12, 1993, which showed on the face of the said notice the trial was to begin on April 14, 1993. The trial was held on April 14 and 15, 1993. On April 15, 1993, Appellant was convicted.

Presiding Judge Walker sentenced Appellant to six months suspended sentence; two years supervised probation; $595.00 Court fines; and 20 weekends of active sentence in the Robeson County Jail. The sentence phase was stayed upon Appellant giving Notice of Appeal to the North Carolina Appellate Division. Appellant, upon losing his appeal was brought to the Robeson County Superior Court on April 25, 1994, for Remand Judgment Hearing. At this hearing, Appellant gave Notice of Appeal to the Supreme Court of the United States and filed Motion to Stay the sentence pursuant to North Carolina General Statute Section 15A-1451. Judge Joe Freeman Britt, presiding at the sentencing hearing, denied Appellant's Motion for Stay and changed the original 20 weekend sentence of active service in jail to 40

consecutive days of active sentence in the Robeson County Jail. Appellant was committed to confinement on April 25, 1994, and released on May 14, 1994. Appellant had no idea that his sentence was being changed from 20 weekends to 40 consecutive days until some time after leaving the Court room as instructed by Judge Britt to see a probation officer. The said officer announced that the term of the sentence was changed as stated above. There was no hearing held of the same.

## REASONS FOR GRANTING THE PETITION

### I.

THE SUPREME COURT OF NORTH CAROLINA ERRED IN HOLDING THAT THERE WERE NO CONSTITUTIONAL ISSUES INVOLVED IN APPELLANT'S PETITION FOR DISCRETIONARY

REVIEW.

The government prosecuted Appellant under North Carolina General Statute Section 14-190.9 on the allegation that he exposed his penis to a fifteen year old female on the evening of March 19, 1992, about 6:05 p.m. Appellant argued at trial that no one made a complaint on him for exposing himself on the night in question as Appellant denied the allegation. Appellant further argued that no warrant for his arrest was ever served upon him for any crime committed. North Carolina General Statute requires that a warrant be issued upon a person before he is arrested and brought before Trial. See the following: North Carolina General Statute Section 15A-401; North Carolina Constitution Article I, Section 20; State v. Mobley, 240 N.C. 476, 83 S.E. 2d 100

(1954); State v. Moore, 275 N.C. 141, 166 S.E. 2d. 53 (1969); State v. King, 285 N.C. 305, 204 S.E. 2d 667 (1974).

Appellant further argued that he never had a documented charge served upon him. Consequently, the real charge brought upon Appellant was done verbally at trial before the jury. Appellant had no idea as to what charges would be brought against him at trial. This action was against Appellant's right guaranteed under Article I, Sections 19 and 23, North Carolina Constitution. Appellant argued that there was no probable cause for his arrest and trial which subsequently led to his conviction and false imprisonment. See Beck v. Ohio, 379 U.S. 89, 13 L.Ed 142, 85 S.Ct. 223 (1965).

Appellant argued that the government brought before the jury an alleged transcript consisting of what may indicate

a confession by the use of the words, "I did it". The transcript consisted of blanks in which the trial Court allowed the witnessing police officer to fill in before the jury over Appellant's objection. The transcript consisted of no name of the person who produced it. The Court allowed a written paragraph to be introduced to the jury as an alleged confession by Appellant. The paragraph was unsigned, not dated and consisted of no officer who supposedly took the alleged statement. The Supreme Court of North Carolina has ruled that when a purported confession of a defendant is offered into evidence and the defendant objects, the trial Court, in the absence of the jury, hears as evidence of both the state and defendant at the vior dire hearing. See e.g., State v. Gray, 268 N.C. 69, 150 S.E.

2d 1, Cert., den 386 U.S. 911 87 S.Ct. 860, 17 L.Ed. 150 S.E. 2d 784; State v. Rogers, 233 N.C. 390, 64 S.E. 2d 572, 28 A.L.R. 2d 1104 (1951). The judge at trial held no vior dire hearing.

At trial, Appellant argued that the trial judge should have corrected the police officer, Dan Ward in telling the jury that he issued a warrant for the arrest upon Appellant on the night in question. The judge refused, and stated to the jury that the State of North Carolina does not require a warrant to be served upon Appellant. The judge cited as a reason that Appellant went with the police officer voluntarily to the police department and from there to the magistrate's office voluntarily, causing the jury to believe that Appellant was admitting to a crime. Appellant argued at

trial that no witness had given a testimony such as the judge cited to the jury. Appellant argued that the police and the judge engaged in perjury. See N.C. General Statute Section 14-209 and 18 U.S.C. Section 1623.

Appellant argued at trial that the government presented a person to testify as to what the arresting officer said who never appeared at trial. This Court has ruled that in all criminal prosecution, the accused has a right to face his accusers. See Pointer v. Texas, 380 U.S. 400, 85 S.Ct. 1065 (1968).

Appellant gave exception to the judge removing three state witnesses whom Appellant attempted to cross examine was a violation of his due process rights to a fair trial guaranteed under the Sixth Amendment to the Constitution of the United States and the Fourteenth Amendment

which makes the Sixth Amendment applicable to the state. This Court ruled "... a major reason underlying the constitutional confrontation rule is to give a defendant charged with a crime an opportunity to cross examine the witness against him. See Dowdell v. United States, 221, U.S. 325, 330 (1911); Motes v. United States, 178 U.S. 458, 474 (1900); Kirby v. United States, 174 U.S. 47, 55-56 (1899); Mattox v. United States, 156 U.S. 237, 242-243 (1986).

Moreover, North Carolina Constitution Article I, Sections 19 and 23 guarantee a criminal defendant the right to cross examine and confront witnesses. See State v. Brewer, 289 N.C. 644 (1976).

II.

THE SUPREME COURT OF NORTH CAROLINA ERRED IN ALLOWING THE DENIAL OF DUE PROCESS OF LAW

**WHEN APPELLANT WAS MORE HARSHLY SENTENCED FOLLOWING RETRIAL FOR THE SAME OFFENSE FROM WHICH HE APPEALED FOR TRIAL DE NOVO.**

Throughout the trial of Appellant, the state at no time produced any record in explanation of the doubly severe harsher sentence imposed upon Appellant, Robert Lee Davis, following his retrial. Throughout the total history of Appellant, he has demonstrated nothing less than a good law abiding citizen. This court has ruled that a harsher sentence was imposed in violation of the Due Process Clause of the Fourteenth Amendment. See North Carolina v. Pearce, 395 U.S. 711 (1969).

Appellant sought the only method he had under North Carolina Law to correct an error that the District Court had made which was to seek relief from any error he

might believe to have prejudicated his trial. Further, North Carolina General Statute § 15A-1335 prohibits the imposition of a harsher sentence upon retrial for the same offense.

This Court ruled that "... Due Process ... requires that a defendant be freed of apprehension of such a raticilitory motivation. (395 U.S. 711, 725).

## CONCLUSION

It is respectfully submitted that for the reasons given above, this petition for Writ of Certiorari should be granted.

Respectfully submitted,

ROBERT LEE DAVIS
Pro Se

APPENDIX A

STATE OF NORTH CAROLINA
DISTRICT COURT OF ROBESON COUNTY

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92 CRS 5565

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STATE OF NORTH CAROLINA

V.

ROBERT LEE DAVIS

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JUDGMENT

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Before: J. Stanley Carmichael
District Court Judge

Appearances:
John Wishop Campbell, Attorney
Stan Todd, Assistant District Attorney
of Robeson County

Six (6) months suspended sentence and one (1) year supervised probation. The cost of fine set at fifty-five ($55.00) dollars. Ordered to report to the Robeson County Mental Health Center.

SO ORDERED

Dated: Robeson County,

North Carolina

May 27, 1992

S/J. Stanley Carmichael
J. Stanley Carmichael
DISTRICT COURT OF ROBESON

APPENDIX B

STATE OF NORTH CAROLINA

SUPERIOR COURT OF ROBESON COUNTY

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92 CRS 5565

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STATE OF NORTH CAROLINA

V.

ROBERT LEE DAVIS

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JUDGMENT

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Before: Russell G. Walker, Jr.
Superior Court Judge

Appearances:
Robert Lee Davis, Pro Se
Stan Todd, Assistant District Attorney
of Robeson County

Six (6) months suspended sentence and two (2) years supervised probation; special probation consisting of twenty (20) weekends active sentence in the Robeson County Jail; Report for initial evaluation by Robeson County Mental Health

Center; not to threat, harass or contact the prosecuting witness nor members of her family; not to go on or about the premises of the prosecuting witness. Pay the cost of five hundred-ninety-five ($595.00) dollars in fines.

SO ORDERED

Dated: Robeson County, North Carolina

April 15, 1993

S/Russell G. Walker, Jr.
Russell G. Walker, Jr.
Superior Court Judge

APPENDIX C

STATE OF NORTH CAROLINA

COURT OF APPEALS

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93-756

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Filed December 21, 1993

STATE OF NORTH CAROLINA

V.

ROBERT LEE DAVIS

Before: Martin, and Wynn
Appeals Court Judges;
Arnold, Chief Judge of
the Appeals Court

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JUDGMENT

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Appeal by defendant from judgment entered 15 April 1993 by Judge Russell Walker in Robeson County Superior Court. Heard in the Court of Appeals 6 December 1993.

Defendant was charged with indecent exposure in violation of G.S. § 14-190.9. He appealed to Superior Court after being

found guilty on 27 May 1992 by Judge J. Stanley Carmichael in Robeson County District Court. The evidence presented at trial tends to show the following:

On the evening of 19 March 1992 the prosecuting witness, a fifteen-year-old girl, was sitting outside of a department store in her parents' vehicle. She watched a man park his black or navy blue small truck within five or six feet of where she was sitting. After opening his door and unzipping his pants, the man exposed his penis and shook it at her. The man got back into his truck and drove away when she began blowing the horn of her parents' vehicle.

The prosecuting witness then ran into the department store and told her parents what had happened. She had memorized the truck's license plate number and asked her mother to write it down. After her

parents spoke with law enforcement officers in the area, they returned home. Officer Ward and Officer Bradley questioned the prosecuting witness at her home that same evening, she described the man as wearing a gray suit, a white button-up shirt, square glasses and a white sailor's hat with the brim pulled down. The license plate number she gave them was assigned to a truck registered to defendant and his wife, who lived five houses down the street.

The officers left the prosecuting witness' home and drove to defendant's address. Defendant's truck was parked there and matched both the description and license plate number given to them by the prosecuting witness. When the officers asked defendant to accompany them to the police department for questioning, he did so voluntarily in his own vehicle. Both

officers observed that defendant's clothing and hat matched the description they had received from the prosecuting witness.

During a taped interview at the police station, defendant signed a waiver of his rights and stated "I did it." Officer Ward and Officer Bradley testified that defendant then wrote out a statement confession in his own handwriting, but did not sign it. At their request defendant voluntarily accompanied them to a magistrate's office in his own vehicle. Officer Ward provided information under oath to the magistrate, who issued a magistrate's order charging defendant with indecent exposure.

The jury found defendant guilty, and he was sentenced to six months imprisonment, which was suspended. As a condition of special probation defendant

was required to serve forty-eight hours in the county jail every weekend for twenty consecutive weeks. Defendant appealed.

Attorney General Michael F. Easley, by Special Deputy Attorney General James P. Erwin, Jr., for the State.

Robert Lee Davis, pro se, for defendant-appellant.

MARTIN, Judge.

Defendant raises twelve assignments of error on appeal. While we find no substantive error in the trial court's judgment, the judgment must be remanded for correction of a clerical error in one of the conditions of special probation.

Defendant argues in his first and third assignments of error that the State failed to obtain a warrant for his arrest. This assignment of error is without merit. Assuming arguendo that defendant's arrest was in violation of G.S. § 15A-401, this

fact would not preclude trial of defendant for the offense. State v. Matthews, 40 N.C. App. 41, 251 S.E. 2d 897 (1979).

Defendant first raised this issue in his motion to dismiss at the close of the State's evidence. After finding that defendant had voluntarily accompanied police officers in his own vehicle to both the police department and a magistrate's office, the trial court rejected defendant's argument because he was not placed under arrest. He was brought before a magistrate who found probable cause existed and issued a magistrate's order charging defendant with indecent exposure in violation of G.S. § 14-190.9.

When defendant asserted during his closing arguments that an arrest warrant was necessary, the State objected. The trial court sustained the State's objection and informed the jury that an

arrest warrant was unnecessary since defendant had not been arrested. Defendant has failed to show any prejudice resulting from the trial court's instruction and none is apparent from the record. See Matthews, 40 N.C. App. 41, 251 S.E. 2d 897 (1979); see also N.C. Gen. Stat. § 15A-1443(a). These assignments of error are overruled.

Defendant next contends that the trial court erred in denying his motion to dismiss due to the insufficiency of the evidence. In ruling on a motion to dismiss, the trial court must determine whether there is substantial evidence of each element of the offense. State v. Vines, 317 N.C. 242, 345 S.E. 2d 169 (1986). The trial court is to consider the evidence in the light most favorable to the state and give it the benefit of every reasonable inference to be drawn

therefrom. State v. Robbins, 309 N.C. 771, 309 S.E. 2d 188 (1983).

The prosecuting witness, a fifteen-year-old girl, testified that a man exposed his private parts in her presence while she was sitting in her parent's vehicle in a department store parking lot. She described the perpetrator's clothing, glasses, hat, truck and its license plate number. This license plate belonged to a truck registered to defendant and his wife . Two police officers testified that when defendant accompanied them to the police department on the evening of the offense, his clothing and hat matched the description given by the prosecuting witness. During police questioning defendant verbally acknowledged his guilt of the offense and wrote a statement. Viewing the evidence in the light most

favorable to the State, there was substantial evidence of each element of the offense. See N.C. Gen. Stat. § 14-190.9. The trial court did not err in denying defendant's motion to dismiss the charge for insufficiency of the evidence.

In his next assignment of error defendant argues that trial court erred in admitting a transcript of his recorded confession which contained blanks. The State properly authenticated the transcript by allowing Officer Bradley to testify that he had compared it to the recording of his conversation with defendant and had found it to be a fair and accurate representation of defendant's confession. See State v. Jeffries, 63 N.C. App. 181, 303 S.E. 2d 618 (1983). Defendant specifically objects to Officer Bradley's testimony as to the content of two of the transcript's blanks, "I went to

get me some inhaler for my nostrils." Officer Bradley was present when the recorded conversation took place and had questioned defendant himself; he had personal knowledge of what defendant said. The trial court did not err in allowing his testimony about the transcript's blanks. Defendant's assignment of error does not support his remaining contentions under this argument and we decline to address them. N.C.R. App. P. 28(b)(5).

Defendant also contends the trial court erred in overruling his objections to testimony by the prosecuting witness' father which allegedly contained hearsay. This argument is without merit. The testimony of the prosecuting witness' father as to her emotional state was properly admitted because he had personally observed that she was crying and quite distressed after relating that a

man had exposed himself to her. His testimony about her statements to him immediately after the incident were also admissible, either as a present sense impression (N.C.R. Evid. 803(1)) or an excited utterance (N.C.R. Evid. 803(2)). The trial court did not err in overruling defendant's objection to this testimony. Although defendant also states that the prosecuting witness' father testified "defendant had exposed his penis to her[,]" the record does not support this assertion.

In his fifth, seventh, ninth and twelfth assignments of error defendant contends that trial court denied his constitutional rights under the Sixth Amendment of the United States Constitution and under Article I, §§ 19 and 23, of the North Carolina Constitution. We have reviewed the record

and find defendant's arguments to be without merit. In his cross-examination of witnesses, defendant persisted in asking about immaterial or irrelevant matters after being admonished as to the improper nature of the questions by the trial court. The trial court did not abuse its discretion by halting defendant's cross-examination of various witnesses in order to avoid confusing the jury and wasting time. N.C.R. Evid. 403.

Defendant failed to cite this Court to any authority in support of his arguments based upon his sixth, eighth and tenth assignments of error. Those assignments of error are deemed abandoned. N.C.R. App 28(b)(5).

In his eleventh assignment of error defendant argues the trial court erred by imposing a sentence in excess of that permitted by G.S. § 14-190.9. As a

condition of special probation the trial court sentenced defendant to serve twenty consecutive forty-eight hour weekends in the county jail. This active sentence, which is less than one-forth of the maximum, penalty allowed for the offense of indecent exposure, is a valid condition of special probation. N.C. Gen. Stat. § 15A-1351(a). Although the transcript and the judgment describe the active sentence as twenty weekend periods of forty-eight hours, the judgment erroneously lists the active sentence as sixty days rather than forty. We remand the judgment so that the active term imposed as a condition of special probation may be corrected to read forty rather than sixty days.

No error in the trial.

Remanded for correction of judgment.

Chief Judge ARNOLD and Judge WYNN concur.

Report per Rule 30(e).

ENTERED BY ORDER OF THE COURT

S/John H. Connell
John H. Connell
Clerk of NC Court
of Appeals

12/21/93

Issued as Mandated A True Copy

Attest:
S/Doris P. Cole
Deputy Clerk

APPENDIX D

STATE OF NORTH CAROLINA

SUPREME COURT

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13 P 94

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STATE OF NORTH CAROLINA

V.

ROBERT LEE DAVIS

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ORDER

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Before: Parker, Justice
Supreme Court of North Carolina

Upon consideration of the position filed by defendant in this matter for discretionary review of the decision of the North Carolina Court of Appeals pursuant to G.S. 7A-31, the following order was entered and is hereby certified to the North Carolina Court of Appeals:

"Denied by order of the Court in Conference, this the 7th day of April,

1994.

S/Parker, J. For the Court

Upon consideration of the notice of appeals from the North Carolina Court of Appeals, filed by the defendant in this matter pursuant to G.S. 7A-30, and the motion to dismiss the appeal for lack of substantial constitutional question filed by the State, the following order was entered and is hereby certified to the North Carolina Court of Appeals: the motion to dismiss the appeal is allowed by order of the Court in conference, this the 7th day of April, 1994.

S/Parker, Justice
For the Court

Witness my hand and the seal of the Supreme Court of North Carolina, this the 11th day of April, 1994.

Christie Speir Cameron
Clerk, Supreme Court of
North Carolina

Pegg N. Byrd
Assistant Clerk